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Clover D. Christensen and The Western Casualty & Surety Company and Mary v. Larsen Individually and as Guardian Ad Litem of Sandra Lee Larsen, a Minor, Mary Kaye Larsen, and Intermountain Service, Inc. v. Farmers Insurance Exchange : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CLOVER D. CHRISTENSEN and THE WESTERN CASUALTY & SURETY COMPANY,
Plaintiffs and Appellants,
MARY V. LARSEN individually and as Guardian Ad Litem of SANDRA LEE LARSEN, a minor, MARY KAYE LARSEN, and INTERMOUNTAIN SERVICE, INC.,
Intervenors and Appellants,
-vs-
FARMERS INSURANCE EXCHANGE,
Defendant and Respondent.

Case No. 11,135

BRIEF OF RESPONDENT

Appeal from the District Court of
Salt Lake County, Utah
Honorable Sewart M. Hanson, Judge

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BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

This is a declaratory judgment action to determine coverage under the automobile liability policy issued by the plaintiff and appellant, Western Casualty & Surety Company, and the defendant and respondent, Farmers Insurance Exchange.

DISPOSITION IN THE LOWER COURT

All of the parties above made motions for summary judgment and after argument and submission of memorandums of law, the trial court held that as a matter of law the automobile business exclusion in the policy issued by Farmers Insurance Exchange

excluded coverage of the accident involving Clover D. Christensen and the deceased, Kurt E. Larsen, that the plaintiff and appellant, Western Casualty & Surety Company, was primarily and solely responsible for coverage of said accident, and accordingly the lower court granted a summary judgment to the defendant, Farmers Insurance Exchange, and denied the motions for summary judgment of the plaintiffs and intervenors herein.

RELIEF SOUGHT

Respondent seeks affirmance of the order and judgment of the lower court granting summary judgment in favor of the defendant and respondent, Farmers Insurance Exchange.

STATEMENT OF FACTS

The uncontroverted facts in this case show that the appellant, Clover D. Christensen, on the 14th day of February, 1963, was operating a service station at 860 Third Avenue, Salt Lake City, Utah, and that for some months previously he had had as one of his regular customers Dr. Vernon L. Stevenson, whose professional office was approximately three blocks away from the service station. It was common practice for Dr. Stevenson to request certain repairs and maintenance work to be completed on his car by Christensen and to leave the accomplishment of those objectives to the control and discretion of Christensen. Ordinarily Dr. Stevenson would deliver the car himself to the station, or Christensen

would drive the car to his station from Dr. Stevenson's parking lot, complete the work at his service station, and then return it to Dr. Stevenson's lot.

Several days prior to the 14th day of February, 1963, Dr. Stevenson had had a conversation with Clover D. Christensen, at which time Christensen suggested that Dr. Stevenson should have his front tires balanced which tires Christensen had sold to him previously. It was also recommended by Christensen that the tie-rod ends be replaced.

On the 14th day of February, 1963, Dr. Stevenson brought his car into Christensen's service station, requested him to replace the tie-rods, balance the wheels, wash the car and fill it with gas. Dr. Stevenson continued onto his office. Several hours later Christensen drove the car from Dr. Stevenson's parking lot to his station where he commenced to complete the requested repairs and maintenance. Christensen intended to charge Dr. Stevenson the standard fees for such work. After having completed all of the other items of work, Christensen found that he was unable to balance the wheels inasmuch as his bubble balancer was broken and did not operate properly. Christensen did not notify Dr. Stevenson about his inability to accomplish the balance work, but decided on his own to complete the wheel balancing by taking Dr. Stevenson's car to the Phillips 66 Training Station, which was more than 45 blocks away from his station (Christensen's

deposition on file herein in the case of *Larsen vs. Christensen and Stevenson.* Supreme Court No. 10833, and Vernon L. Stevenson's affidavit, Record page 116). Christensen's purpose for taking the car to the training station was to do a good job for Dr. Stevenson since he was such a good customer. Christensen stated in his deposition from pages 21-22 (an exhibit herein which, however, is still on file as an exhibit in the case of *Larsen vs. Christensen and Stevenson,* Supreme Court No. 10833, which is presently before the Court):

"Q. And then you started to do this wheel balancing, and you say your machine was not functioning properly?

A. Yes, that's right.

Q. What was wrong with it if you know?

A. Well, it was one of the less expensive machines, and it was what they call a bubble balancer. It was a little float bubble in the top, and this bubble wouldn't center the way it should to balance the wheel. *And he was a good customer of mine; I wanted to do a good job on his car; that's when I decided I better take it some place else to have these wheels balanced. I didn't trust the machine.* (Emphasis ours)

Q. Did you talk with Dr. Stevenson about taking it outside of your station for this work?

A. No, I didn't."

While driving the automobile to the Phillips 66

Training Station, Christensen was involved in a collision with a motorcycle driven by Kurt E. Larsen at the intersection of Tenth East and First South in Salt Lake City. At no time prior to this accident had Christensen ever provided services or maintenance for Stevenson's automobile outside of his own service station, and at no time prior to the accident had Christensen asked Dr. Stevenson's permission to drive the car anywhere else other than to and from his service station and Dr. Stevenson's parking lot.

Eventually, a lawsuit was brought by the present intervenors against Dr. Stevenson and the plaintiff, Clover D. Christensen. In the pretrial in that case, the court dismissed Dr. Stevenson as a defendant on the grounds that Christensen was acting as an independent contractor and not an agent. The defendant and respondent, Farmers Insurance Exchange, denied coverage in behalf of the appellant, Clover D. Christensen, on the grounds that the use of the Stevenson automobile by Christensen was in the automobile business as defined in its policy of insurance and was excluded under the terms of said policy.

The appellant, Western Casualty & Surety Company, prior to the time of said accident, had issued a service station liability policy to Christensen covering any liability arising from the service station operation. Western Casualty in its reply to defendant's requests for admissions admitted that its policy

of insurance issued to Clover D. Christensen was in full force and effect at the time of the accident (R. page 38). Western Casualty has provided a defense to the wrongful death action brought against Christensen by the present intervenors.

By bringing this action, the appellant, Western Casualty & Surety Company, is attempting to relegate itself to the status of a secondary insurer, and the intervenors are attempting to secure additional insurance over that provided by Western Casualty, the service station insurer.

As a result of the denial of coverage by the respondent, a declaratory judgment action was initiated into which the original plaintiffs intervened. All parties stipulated to the essential facts and made motions for summary judgment; and upon oral argument and submission of written memorandums the Honorable Stewart M. Hanson held that the respondent's motion for summary judgment should be denied (R. page 102). Subsequently, the court entered an order holding that the use of the automobile by Christensen was within the distinctive definition of automobile business contained in the respondent's policy, thus excluding coverage under said policy (R. page 103).

The respondent's policy provides as follows:

"THIS POLICY DOES NOT APPLY UNDER PART I:

. . . (6) While the described automobile is

being used in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner or any partner or employee of the named insured, such resident or partnership; . . . ."

Under the definition in Part I, automobile business is defined as follows:

"(2) AUTOMOBILE BUSINESS. 'Automobile Business' means the business of selling, repairing, servicing, storing, washing, delivering, testing or parking automobiles, their parts or equipment." (R. page 12)

ARGUMENT

POINT I.

THE AUTOMOBILE BUSINESS EXCLUSION AND DEFINITION WITHIN THE RESPONDENT'S POLICY ARE CLEAR AND UNAMBIGUOUS AND THEREFORE SHOULD BE CONSTRUED ACCORDING TO THEIR PLAIN LANGUAGE AND MEANING, THUS DENYING COVERAGE.

Respondent does not quarrel with the general proposition that an insurance policy will be construed against an insurance company strictly where there are ambiguities, uncertainties, or doubt in the terms of the policy, *Jorgensen vs. Hartford Fire Insurance Company*, 13 Utah 2nd 303, 373 Pac. 2nd 580 (1962), however, respondent vigorously disagrees with the propositions set forth in Point I of appellant's brief that a policy should be so construed as to afford coverage. Such statement is merely the ambitions of the appellants and is not a correct state-

ment of the law. It appears quite obvious that if the respondent's policy had merely excluded coverage while the car was being used in the automobile business but then failed to define the automobile business, an ambiguity possibly would occur; however, we are not faced with such a problem here inasmuch as the respondent's policy provides a clear and concise definition of the words "automobile business" as it applies in that policy. The appellants would like to create an ambiguity by engaging in lexographic exaggerations which are not warranted in light of respondent's definitive policy exclusion which is more expansive than other automobile business exclusions in that it adds these additional facets of the automobile business: washing, delivering, and testing. However, even the more restrictive version of the automobile business clause which was applied in the cases cited by the appellants has been specifically held to be without any ambiguity.

In the case of *Walker vs. State Farm Mutual Auto Insurance Company,* 190 N.E. 2nd 121, Illinois (1963), the court was construing an exclusion clause identical with that in the respondent's policy except that it did not contain the three additional facets of the automobile business: washing, delivering, and testing. The court in the *Walker* case held that there was no ambiguity in the automobile business exclusion clause, and therefore there was no basis to invoke the principle of resolving ambiguities in favor of the insured. The court further held that the use

of an automobile in the various activities, which by definition constitute the carrying on of the automobile repair business (i.e. selling, repairing, servicing, storing, and parking automobiles, their parts or equipment) was excluded from coverage under the policy.

That conclusion is even more easily arrived at in the present case inasmuch as the clause in respondent's policy specifically adds three major areas of use that a garage or service station makes of a car left in its custody by a customer: washing, delivering, and testing. Thus, quite obviously, a vehicle being operated within the functions enumerated is not covered by the policy. To read the automobile business exclusion and definition in any way other than what it clearly and precisely delineates by its own wordng would be an arbitrary and unwarranted destruction of the policy contract.

POINT II.
AS A MATTER OF LAW, STEVENSON'S AUTOMOBILE WAS BEING USED IN THE AUTOMOBILE BUSINESS AT THE TIME OF THE ACCIDENT.

Appellants in their Point II apparently are attempting to create a relevant distinction between "having cusody of" and "using" in order to conclude that Chrisensen had mere custody of the vehicle and thus the exclusion did not apply. Respondent respectfully submits that the appellants' statement that the question on appeal resolves itself down to the meaning of the word "used" or the phrase "being used in" is a red herring, for in fact the sole question to

be decided is whether the use of the car by Christensen came within the definition of automobile business set forth in the respondent's policy. The appellants assert that the exclusion refers only to use and not to identity of the driver, and that all cases are irrelevant that were cited under the older used exclusion whereby coverage was not afforded where an automobile was being used by service or repair personnel within the service or repair operation. The appellants, however, overstate the difference between that exclusion and the automobile business exclusion, for in any event neither of the exclusions become effective unless the particular vehicle was being used by a service station operator or repairman and within the ambit of the service or repair operation. Thus the question under both exclusions resolves itself down to whether or not the use came within the prohibited activities as defined in the particular policy. The real difference between the two exclusion clauses is that the automobile business exclusion is more specific in defining the area of the excluded use and thus gets away from the charge that it is ambiguous. The statement by the appellants that the purpose for the word change by the insurance companies was to limit the coverage of the exclusion is pure speculation and is wholly without factual basis in this case. It is just as reasonable to conclude that the "automobile business" exclusion was meant to be more expansive that the old exclusion.

Numerous cases construing the previously used

exclusion are cited in 47 ALR 2nd 566, and an examination of those cases will show that courts were usually concerned with whether or not the particular use being made of the car came within the sphere of the operations of the service station or repair shop. Under the automobile business exclusion cases using a more restrictive definition than is contained in the respondent's policy, the courts have likewise been concerned with determining whether or not the use of the vehicle was within the spheres of the automobile business set forth in the particular policy's definitions. Quite obviously, some courts have found use of a vehicle under certain particular facts to be outside of the sphere of automobile business defined in the policy. These are the cases cited by the appellants in their brief; however, even these few cases are not inconsistent with the position of the appellants inasmuch as those cases are generally concerned with activities involving delivery or testing, which are facets of the automobile business not contained within the definitions in the policies there under scrutiny. However, had these policies had the definiton of automobile business contained in the respondent's policy, those courts would then have had the basis for applying the exclusion as did the trial court in the present case. The case directly in point is the case of *Goforth vs. Allstate Insurance Company*, 327 2nd 637 (CA 4th, North Carolina), extensively argued by the appellants, where the court held that an accident

which occurred while the customer's automobile was being delivered to him by the service personnel did not come within the automobile business exclusion, which, of course, did not contain in its definition the facet of *delivering* as does the respondent's policy. The court in arriving at its decision made it clear that had the definition of automobile business in the policy included delivering as a facet of the automobile business, the result would have been different. The court said on page 618 in referring to what constituted the automobile business:

> ". . . That business could, of course, include the transportation of motor vehicles to and from a garage for the purpose of repairing. No such meaning (i.e. transporting) is found within the definition, and it would have been easy to supply. The policy was written by Allstate and not by the additional insured Melton (service station operator). Wherever ambiguous, it should be read against the scrivener... The omission to include *transporting* of automobiles along with selling, repairing, servicing, storing or parking them is significant, and implies an intent not to enlarge the exclusion."

Thus, it appears quite clear under the *Goforth* case, which appellants rely upon, that coverage would have been excluded had the policy contained the definition contained in the respondent's policy.

The point is unmistakable that the cases cited by the appellants do not shed light upon the problem now facing the Court inasmuch as every one of those

cases contain a definition much more restrictive than that contained in the respondent's policy. We, therefore, turn to an analysis of the facts of this case in connection with this particular exclusion.

Respondent contends that the judgment of the lower court is supported by either of two bases, the second of which is conceded by the appellants in their brief. First, that the use of the automobile by Christensen was a use within the service and repair facets of the automobile business; and secondly, that the car was in fact being used to secure equipment to facilitate the completion of the repairs, which appellants concede on page 11 and elsewhere in their brief would be a use within the automobile exclusion. Taking the first basis of exclusion, we find various cases with analogous facts wherein coverage was denied. In the case of *Universal Underwriters Insurance Company vs. Strohkorb*, 137 S.E. 2nd 913, Virginia (1964), the owner of the car when desiring to have repairs completed upon it would take the car to the Bayside lot of the service and repair company, and from there it would be taken by an employee of the company to the repair garage at Virginia Beach. After the repairs had been completed, it would be returned to the Bayside lot and from there delivered to the owner. At the time of the accident the employee of the company was driving the car from the repair garage at Virginia Beach to the Bayside lot. The facts showed that such a service was offered to the customers for the purpose of increasing the

company's business and retaining the goodwill of the customers. Universal Underwriters Insurance Company had issued a garage liability policy to the repair company, and United Services Automobile Assciation had issued an automobile liability policy to the owner of the automobile. A declaratory judgment action was brought by Universal Underwriters against the automobile insurer to determine the obligations of the two companies. United Services alleged in defense that coverage was excluded under its automobile business exclusion. The exclusion in that case was the automobile business exclusion which as pointed out previously is more restrictive than the respondent's policy. The court there held that the car was being used in the automobile business and that coverage was therefore not afforded under United Services policy. In doing so the court held that the use of the automobile at the time of the collision was "an integral part of the service offered customers for the obvious purpose of increasing business." In the *Strohkorb* case the situation was not one of delivery to the customer, but rather was the use of the vehicle within its service operation, transporting it to where the service and repair equipment was located. In the present case Christensen was making identical use of the car: driving it to another location to complete the repairs. The above-cited case of *Universal Underwriters Insurance Company vs. Strohkorb*, supra, also presents an additional basis for excluding coverage under the automobile pol-

icy where a garage policy is also involved. In that case, as in the present case, the plaintiff in the declaratory judgment action was the insurer who had issued the service station policy, which policy provided essentially as does the appellant, Western Casualty's policy that liability coverage is afforded for all operation necessary or incidental thereto to the service station business and the use of an automobile in connection with such operations (R. page 6). The court observed that the insurer issuing the service station policy covered the use of the automobile at the time of the accident and resulting loss. The court then held that the scope of coverage for the service station policy was identical with that of the automobile business exclusion in the automobile policy; and by admitting that its policy covered the use, the garage insurer thereby admitted the application of the automobile business exclusion to such use. The court reasoned that the obvious purpose of the automobile business exclusion was to protect the automobile insurer from liability on the use of the car while under the sole and exclusive custody of the independent contractor servicing and repairing the automobile. The court stated in this regard:

> "Obviously, if the operation of the car by Purdue (garage employee) was a use in the automobile business of EmRhae Motors within the meaning of the insuring clause of Universal's policy, it was a use in such automobile business within the meaning of the exclusion clause of United's policy. The obvious purpose

> of the exclusion clause in United's policy is to relieve the insurer from the very liability which is covered under the terms of the garage liability policy of Universal. The risks under the two types of policies are obviously different, and, no doubt, the rates are different." (page 915)

Similar reasoning was set forth in the case of *Nationwide Mutual Insurance Company vs. Federal Mutual Insurance Company*, 134 S.E. 2nd 253, Virginia (1964), where the owner of a car sales agency was test driving a car he contemplated buying. Nationwide had issued a garage policy to the agency, and Federal Mutual had issued an automobile liability policy to the owner of the car. Both companies denied coverage, and the judgment creditor sued both of them. The trial court found that the garage policy afforded coverage but that coverage under the automobile policy was excluded under the more restrictive automobile business exclusion. On appeal the appellate court affirmed the trial court's findings and held that the driving of the automobile was an important *element* in the business of *selling* automobiles and that therefore the automobile policy did not apply.

And in a case involving the same insurance company, *Nationwide Mutual Insurance Company vs. McAbee*, 150 S.E. 2nd 496, North Carolina (1966), the repair company had picked up the owner's car at his residence took it to their shop, completed the repairs, and while returning it to the

owner's home an accident occurred. Nationwide insured the car, and Federal Mutual had issued the garage policy to the repair shop. Nationwide contained the more retrictive form of the automobile business exclusion. The trial court in the declaratory judgment action between the two insurance companies held that Nationwide afforded coverage for the loss; and on appeal the trial court was reversed. The appellate court found that the returning of the automobile was part of the regular *repair service* offered by the repair company. (Emphasis ours) The court reasoned that the purpose of an automobile business exclusion was quite logically to exclude coverage while in the custody of service or repair personnel, and that therefore any use arising out of that operation would be excluded. The court then made a direct attack against the *Goforth* case previously cited herein and others using similar rationale. The court said:

> "The appellees cite cases holding that transportation to and from a garage for repairs is not used in the automobile garage business. Among the cases is *Goforth vs. Allstate Insurance Company*, 220 F. Supp. 616, a District Court decision. On appeal, the Fourth Circuit, by per curiam decision, 327 F. 2nd 637, said: 'We agree with the District Court that a private automobile being driven from the place of business of the owner by a garage keeper to his garage for the purposes of affecting repairs . . . was not being used in the automobile business within the meaning of the exclusion clause in the owner's liability insurance policy.' The court attempted to justify the reason-

ing by saying the business of a man driving the car did not determine the business in which the car was being used while he drove it. The decision has been soundly criticized. The Fifth Circuit in *Sanders vs. Liberty Mutual Insurance Company*, 354 F. 2nd 777, rejected the theory advanced by the Fourth Circuit and held the exclusion did apply. The Goforth decision holds the use was not in the automobile business, therefore not insured by the garage policy but by the owner's policy. . . ."

The court then held as a matter of law that the use of the owner's car by the repair company at the time of the accident was within the automobile business exclusion of Nationwide's policy.

And in another case involving Nationwide Mutual, *Nationwide Mutual Insurance Company vs. Exchange Mutual Insurance Company*, 49 Misc. 2nd 707, 268 NYS 2nd 495, a service station operator had received a request to come to the owner's residence, pick up the automobile, drive it to his station, wash it, and then return it. After completing the washing and while returning the automobile to the owner, an accident occurred. The service station operator testified that the pick up-delivery service which he was performing was a free service, which he would perform for any of his customers if they so requested it. In this case the question was whether the returning of the car arose out of the operation of the service station. The court referred to the *Goforth* case and distinguished that case on the basis that the court felt that the definition in the policy

was not broad enough to include transporting. The court held that this was not the situation in the case before it, since the exclusion clause there specifically stated that it excluded using the car with respect to any occurrence arising out of the operation of the service station. Likwise in the present case, the respondent's expanded definition so defines automobile business as to create a definition as expansive as the definition in this case, touching the occurrences arising out of the operation of the service station.

And in the case of *Sanders vs. Liberty Mutual Insurance Company*, 354 F. 2nd 777 (1965), the owner of the automobile drove to the service station, asked the operator to ride back to his home with him, and then drive the car back to the station to wash it. The accident occurred while the service station operator was driving the car back to the station. The trial court granted a summary judgment in behalf of the automobile insurer who was claiming no coverage because of the automobile business exclusion. The exclusion was the more restrictive version of the automobile business exclusion. The plaintiff relied on the *Goforth* case. The court, however, rejected the reasoning of the *Goforth* case and held: "The policy by its terms, when reasonably construed, excluded the car from coverage when it was under the control of Sanders' employee driving the car to the service station to be washed." (Page 779). This court thus directly construed the exclusion as apply-

ing to the use of the automobile while in the custody of the repair of service personnel in activities connected with the service or repair operation.

And in the case of *Walker vs. State Farm Mutual Automobile Insurance Company*, 190 N.E. 2nd 121, Illinois (1963), the repair shop owner took a car to another town to pick up some oil filters, and while on such trip the accident occurred. State Farm's policy contained the more restrictive automobile business exclusion clause. The trial court held that the exclusion did not apply. On appeal the trial court was reversed. The appellate court held that there was no ambiguity in the automobile business exclusion clause and further held that the operation of a repair garage includes all the various activities which together constitute the carrying on of its business, and since the activity in which the garage owner was engaged at the time of the accident fell within the terms of the exclusion, there was no liability under the policy.

Thus, in the above cases coverage was excluded under the automobile business exclusion on the rationale that the use of the vehicle by the service or repair personnel in connection with the activities of *repairing* and *servicing* the automobile are excluded. Thus, these cases have taken the reasonable approach that the words *repairing* and *servicing* in the definition mean what they say. In the present case the automobile was in Christensen's custody for the purpose of repairing and servicing the auto-

mobile, and the use of the automobile was directly within the service and repair operation inasmuch as it had not been completed and was being transported for the purpose of completing those repairs. To deny that the car was being used in the automobile business would be a bald destruction of the clearly defined facets of repairing and servicing.

Appellants in their brief attempt to completely emasculate any meaning from the repair and service facets of the automobile business by declaring that the word "use" would apply only to the operation of the vehicle within those operations as a tool or delivery vehicle. However, even an elementary knowledge of repair and servicing operations would immediately dictate that such an interpretation of the word "use" is unreasonable and unrealistic in that it is difficult to conceive of an automobile being used in a repair or servicing process other than while being driven for the purpose of facilitating the service or repair operation. Appellants wish to create an exclusion that factually could never have application, i.e. that the exclusion would only apply where an automobile is somehow being used to repair or service another automobile, which clearly is a strained and unwarranted interpretation of the exclusion.

It is abundantly clear from the cited cases that coverage is excluded where the automobile is being operated within the sphere of the repair and service operation. Add to this the respondent's definition of

automobile business, and any doubt is eliminated as to whether coverage of the automobile was intended to be excluded while used within the operations enumerated. Could the washing aspect have any meaning unless it applied to the customer's automobile as it was being washed or driven by the service personnel to accomplish that end? Obviously not. It is obvious to the respondent and was likewise to the trial court below that in order to ascribe any meaning to the respondent's definition of automobile business, coverage had to be excluded under the facts of this case.

The second base supporting the trial court's decision in favor of the respondent is that the exclusion would apply to the facts of this case under the appellant's interpretation of the scope of use in the automobile business. On page 8 of appellants' brief, they state:

> "Appellants, as a matter of policy interpretation, understand an automobile 'used in' the automobile business is one being used to secure parts, to obtain equipment, to obtain supplies, to deliver equipment, to make repairs, to make service calls, or an automobile engaged as a tool or item of equipment."

As pointed out above, respondent contends that such interpretation tortures the obvious meaning of the exclusion; however, assuming arguendo that appellants are correct in their interpretation, the facts here show that Christensen's use of the automobile was to secure parts and equipment, and to make repairs. Christensen had contracted to accomplish an

objective for a regular customer, to-wit: to balance the wheels at his place of business. After so contracting, he discovered that his wheel balancer was inoperative. At that point, he had three alternatives: he could get another balancer; he could get his balancer repaired; or instead of bringing a balancer to the car, he could take the car to a balancer that was working properly. Obviously, all three alternatives were equally connected with his completion of the service and repair operation on Stevenson's automobile. When Christensen drove the automobile to the Phillips 66 Training Station, he was taking the automobile to the equipment rather than bringing the equipment to the automobile. Obviously, had he have driven his customer's vehicle to the training station, picked up a wheel balancer, and while driving the vehicle containing the wheel balancer back to his station to complete the work he was involved in an accident, coverage would be excluded under the appellants interpretation of the exclusion clause. The fact that the wheel balancer was not brough back to his station in the vehicle does not change the use of the vehicle at the time of the accident, inasmuch as the fact still remains that the car was being driven to obtain the use of equipment which had become unavailable to him as his own station. It is interesting to note that on page 21 of the appellants' brief in referring to the above-cited case of *Walker vs. State Farm Mutual Auto Insurance Company*, supra, the

appellants concede that in that case the car was being used to obtain a piece of equipment at a parts company in another town. Could the appellants reasonably argue that had the car been driven to the other location and there the oil filter installed that the situation would have been any different? Again, respondent thinks not. The appellants' assertion that the use of the vehicle was merely an accommodation to the owner Stevenson is clearly rebutted by Christensen's own statement in his deposition, as more particularly set out in the Statement of Facts in respondent's brief, that the purpose of the trip was to complete the repairs and maintain the goodwill of his customer (which obviously is an item of great worth in the service station business).

The trial court should hardly be considered to be in error for holding that such use of a vehicle was for the immediate purpose of securing the equipment and means to complete his job, and thus putting the use within the automobile business exclusion. Respondent respectfully submits that in the cases cited by the respondent and the cases cited by the appellants there does not exist a factual situation which is so clearly within the automobile business as the case at bar, where under even the appellants' evidence it is established that the vehicle was being used for the benefit of the service station owner and to enable him to complete his contract with the owner. If such use does not come within the respondent's automobile business exclusion, it would

appear that the exclusion is completely without meaning and effect.

For the above stated reasons, respondent requests the court to affirm the judgment of the trial court in granting the respondent's motion for summary judgment and in denying appellants' motions for summary judgment.

POINT III.

INASMUCH AS COVERAGE IS SPECIFICALLY EXCLUDED UNDER THE FARMERS POLICY, THE APPELLANT, WESTERN CASUALTY, IS THE SOLE AND PRIMARY INSURER FOR ANY LIABILITY ARISING FROM SAID ACCIDENT.

It is the position of the respondent that there is no coverage under the Farmers policy; however, should the Court get to the question presented in Point III of appellants' brief, respondent contends that the Court has no alternative other than to enforce the pro-rata clauses contained in Western's policy and in Farmers' policy as set forth in the appellants' brief. The appellants refer to what they call the general rule as to excess and primary coverage; however, where both policies contain a pro-rata clause, quite obviously the rights between the two insurers are thus to be determined pro-rata. In this connection see the annotation in 69 ALR 2nd 1122, that where the policies purport to be excess the court has ordered pro-ration either on the policy limits or on some other equitable basis.

CONCLUSION

Respondent respectfully submits to the Court that the trial court was correct in its conclusion that

> "As a matter of law at the time of said accident the use of the Stevenson vehicle by the plaintiff, Clover D. Christensen, was a use within the automobile business as defined in the defendant's policy of insurance, and therefore the automobile business exclusion applied to Christensen and coverage of any liability he may incur as a result of said accident is excluded under defendant's policy of insurance, and that the plaintiff Western Casualty & Surety Company is the sole and primary insurer of any liability Christensen may incur as a result of said accident."

The distinctive automobile business exclusion contained in appellants' policy very clearly excludes coverage of a customer's vehicle being driven or otherwise used in connection with the functions enumerated in the definition. To find otherwise would be to negate completely the obvious intent and language of the policy.

Equally as apparent is the fact that use of the vehicle by Christensen was within the service and repair operations and in addition to that was being used as a means to obtain equipment for the completion of said repairs and service. Under the facts here the trial court had no alternative but to exclude coverage under this policy.

Respondent requests the Court to affirm the summary judgment granted in its favor.

Respectfully submitted,

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